Ensign Electric, Division of Harvey Hubble, Incorporated *and* David R. Rice

United Steelworkers of America, Local 5925, AFL-CIO-CLC *and* David R. Rice. Cases 9-CA-15824, 9-CA-16722, 9-CB-4698, and 9-CB-4892

25 January 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 9 September 1981 Administrative Law Judge Thomas R. Wilks issued the attached decision. The General Counsel filed exceptions and a supporting brief, and Respondent Employer and Respondent Union, respectively, filed cross-exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The provision in dispute is contained within the collective-bargaining agreement between the Respondents and provides for superseniority for "The local union president, vice-president, recording secretary, financial secretary and treasurer and grievance committee . . . and union stewards in the event of a layoff." The parties stipulated that the positions of recording secretary, financial secretary, and treasurer are not directly involved in the processing of grievances. However, the judge found that they performed vital and meaningful duties which were sufficiently related to the Union's ultimate goal of maintaining an effective relationship between the Respondents.[1] Therefore, he determined that Respondent Employer and Respondent Union had not unlawfully maintained and enforced a superseniority provision in their collective-bargaining agreement which granted preferential seniority for purpose of layoff to Recording Secretary George McCoy and Treasurer Douglas Jarrell.[2] Thus, the judge, relying on *Dairylea Cooperative*[3] and *Electrical Workers UE Local 623 (Limpco Mfg.)*,[4] concluded that the complaint was without merit and should be dismissed.

The General Counsel contends that the functions performed by the recording secretary, financial secretary, and treasurer relate solely to the internal administrative concerns and needs of the Union and only indirectly relate to the representative of unit employees. The exceptions also emphasize that these administrative functions are not performed on the job, during working hours, but instead are performed at their respective homes.

In *Gulton Electro-Voice*,[5] the Board recently reexamined the issue of superseniority for union officials and overruled *Limpco*, above, and its progeny.[6] While superseniority benefits limited to layoff and recall still may be accorded to stewards, no superseniority benefits at all may be extended to union officials who, like the officers in this case who received superseniority, are not involved in grievance processing or other on-the-job contract administration or steward-like duties.[7] Thus, we find merit to the exceptions as applied to the recording secretary and treasurer. Accordingly, we find that, by maintaining and enforcing the superseniority clause with respect to the recording secretary and treasurer during Respondent Employer's March 1980 to April 1981 layoff periods, Respondent Union has violated Section 8(b)(1)(A) and (2) of the Act, and Respondent Employer has violated Section 8(a)(1) and (3) of the Act.[8] Furthermore, by according Recording Secretary McCoy and Treasurer Jarrell superseniority under the disputed clause with respect to layoffs on various dates between March 1980 and April 1981, and thereby affecting employees who would not have been affect-

[1] For a more detailed discussion, see the judge's decision under the heading "The Union."

[2] We adopt the judge's finding that Financial Secretary Valkie Fetty had sufficient "natural or earned seniority" which exceeded that of employees laid off between March 1980 and April 1981 and that there was no invoking of the superseniority clause as to him. Accordingly, we shall dismiss the complaint allegations regarding Fetty.

[3] 219 NLRB 656 (1975), enfd. sub nom. *Teamsters Local 338*, 531 F.2d 1162 (2d Cir. 1976).

[4] 230 NLRB 406 (1977), enfd. sub nom. *Anna M. D'Amico v. NLRB*, 582 F.2d 820 (3d Cir. 1978.)

[5] 266 NLRB 406 (1983).

[6] *Otis Elevator Co.*, 231 NLRB 1128 (1977); *American Can Co. (I)*, 235 NLRB 704 (1978); *American Can Co. (II)*, 244 NLRB 736 (1979), enfd. 648 F.2d 746 (10th Cir. 1981).

[7] We agree with the General Counsel's contention that the participation of these officers on the Union's executive board where grievances may be discussed and/or processed is not in the nature of on-the-job steward-like or contract administration functions because these activities do not take place at the plant site or during working hours. *McQuay-Norris*, 258 NLRB 1397 (1981). See also *Automobile Workers Local 501 (Bell Aerospace Textron)*, 267 NLRB 154 (1983).

[8] In their exceptions, the Respondents contend that the allegations of the complaint are barred by the operation of the 6-month limitation proviso to Sec. 10(b) of the Act. Contrary to their assertions, the consolidated complaint does not attack the execution of the contract nor does it relate to when the officers were elected and took office. Instead, only the Respondents' maintenance and enforcement of its superseniority clause within the applicable 10(b) period is in issue. It is well established that each act or incident of such enforcement constitutes a reaffirmance or renewed entering into of the superseniority clause. Accordingly, we find the Respondents' exceptions lacking in merit. *Automobile Workers Local 561 (Scovill)*, 266 NLRB 952 (1983); *Actors' Equity Assn.*, 247 NLRB 1193 (1980), enfd. 644 F.2d 939 (2d Cir. 1981); *Connecticut Limousine Service*, 235 NLRB 1350 (1978), enfd. in part sub nom. *NLRB v. Teamsters Local 443*, 600 F.2d 411 (2d Cir. 1979).

ed if the collective-bargaining agreement had not accorded them superseniority, Respondent Employer discriminated against employees in violation of Section 8(a)(1) and (3) of the Act, and Respondent Union thereby violated Section 8(b)(1)(A) and (2) of the Act.

Conclusions of Law

1. Ensign Electric, Division of Harvey Hubble, Incorporated, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. United Steelworkers of America, Local 5925, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.
3. By maintaining and enforcing a seniority clause in their collective-bargaining agreement according Respondent Union's recording secretary and treasurer superseniority, Respondent Employer and Respondent Union have engaged in, and are engaging in, unfair labor practices within the meaning of Sections 8(a)(1) and (3) and 8(b)(1)(A) and (2) of the Act, respectively, and by discriminating against unit employees, including employees David Rice, Raymond Soward, Paul Sansom, Charles Deal, Nelson Edmonds, Otho Mullins, Jimmy Nance, Clarence Copley, Joney Watts, and others, when Respondent Employer laid off employees who would not have been affected if the collective-bargaining agreement had not accorded the recording secretary and treasurer superseniority, the Respondents engaged in further violations of the aforesaid sections of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
5. Except as described above, the Respondents have not otherwise violated the Act.

The Remedy

Having found that the Respondents have engaged in certain unfair labor practices, we shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

We have found that the superseniority clause here in dispute is unlawful and we shall therefore order that Respondent Union cease and desist from maintaining and enforcing such clause in its bargaining agreement with Respondent Employer with respect to Respondent Union's recording secretary and treasurer. We shall also order that Respondent Employer cease and desist from maintaining and enforcing such clause in its bargaining agreement with Respondent Union. We have also found that the unlawful superseniority clause was so applied as to lay off employees David Rice, Raymond Soward, Paul Sansom, Charles Deal, Nelson Edmonds, Otho Mullins, Jimmy Nance, Clarence Copley, Joney Watts, and others between March 1980 and April 1981 who would not have been laid off but for the illegal discrimination depriving them of seniority. Consequently, we shall order that Respondent Employer offer to reinstate any employees, including those named above who would not have been laid off but for the unlawful assignment of superseniority to the recording secretary and treasurer, and that the Respondents jointly and severally make affected unit employees whole for any loss of earnings they may have sustained as a result of the discrimination against them. We shall also order that Respondent Employer expunge from its files any reference to the unlawful layoffs, and shall notify the affected employees that this has been done and that the unlawful layoffs will not be used as a basis for future personnel actions against them. Backpay shall be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962). Also, in order to remedy in full the effects of Respondent Union's unlawful conduct, we shall order Respondent Union to notify Respondent Employer and all affected employees, including those named supra, that it does not object to their reinstatement to the positions they held prior to the enforcement of the superseniority clause against them. Also, in order to remedy in full the effects of the Respondents unlawful conduct, Respondent Employer's backpay obligation shall run from the effective date of the discrimination against the affected unit employees to the time it makes such recall offers, while Respondent Union's obligation shall run from such effective date to 5 days after the date of its notification to Respondent Employer that it has no objection to the recall of unit employees affected by the unlawful grant of superseniority to union officers. Finally, we shall order that Respondent Employer cease and desist in any like or related manner from interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act, and that Respondent Union likewise cease and desist from restraining or coercing employees it represents exercising those same rights.

ORDER

The National Labor Relations Board orders that

A. Respondent Employer, Ensign Electric, Division of Harvey Hubble, Inc., Huntington, West

Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a collective-bargaining provision with Respondent Union, United Steelworkers of America, Local 5925, AFL-CIO-CLC, according the Union's recording secretary and treasurer superseniority.

(b) Discriminating against any employees, including employees David Rice, Raymond Soward, Paul Sansom, Charles Deal, Nelson Edmonds, Otho Mullins, Jimmy Nance, Clarence Copley, Joney Watts, and others, when such employees have greater seniority in terms of length of employment than has one of the aforementioned union officials.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Respondent Union make any unit employees, including those named above, whole for any loss of earnings they may have suffered as a result of the discrimination against them, such earnings to be determined in the manner set forth in the section of this Decision entitled "The Remedy," and offer to reinstate any employees who would not have been laid off but for the unlawful assignment of superseniority to the recording secretary and treasurer.

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and the route assignment due under the terms of this Order.

(c) Expunge from its files any reference to the layoff of any employees affected by the superseniority as applied to the Union's recording secretary and treasurer from March 1980 to April 1981, and notify them in writing that this has been done and that evidence of the unlawful layoff will not be used as a basis for future personnel actions against them.

(d) Post at its establishment in Huntington, West Virginia, copies of the attached notice marked "Appendix A."[9] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent Employer's representative, shall be posted by Respondent Employer, immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Post at the same places and under the same conditions as set forth in paragraph A,2,(d), above, as soon as forwarded by said Regional Director, copies of the attached notice marked "Appendix B."

(f) Mail signed copies of the attached notice marked "Appendix A" to the Regional Director for Region 9 for posting by Respondent Union.

(g) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent Employer has taken to comply herewith.

B. Respondent Union, United Steelworkers of America, Local 5925, AFL-CIO-CLC, Huntington, West Virginia, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining, enforcing, or otherwise giving effect to those clauses in its collective-bargaining agreement with Respondent Employer, Ensign Electric, Division of Harvey Hubble, Incorporated, according the Union's recording secretary and treasurer superseniority with respect to layoff and recall.

(b) Causing or attempting to cause Respondent Employer to discriminate against employees in violation of Section 8(a)(3) of the Act.

(c) In any like or related manner restraining or coercing employees of Respondent Employer in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Respondent Employer make any unit employees, including those named above, whole for any loss of earnings they may have suffered by reason of the discrimination against them, such lost earnings to be determined in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Notify Respondent Employer and all affected employees in writing that it has no objection to reinstating the affected unit employees who but for the unlawful assignment of superseniority would not have been laid off or reassigned.

(c) Post at its office and meeting halls used by or frequented by its members and employees it represents at Respondent Employer's Huntington, West Virginia, facility copies of the attached notice

[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

marked "Appendix B."[10] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent Union's representative, shall be posted by Respondent Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Union to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Post at the same places and under the same conditions as set forth in paragraph B,2,(c), above, as soon as forwarded by said Regional Director, copies of the attached notice marked "Appendix A."

(e) Mail signed copies of the attached notice marked "Appendix B" to the Regional Director for Region 9 for posting by Respondent Employer.

(f) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent Union has taken to comply herewith.

[10] See fn. 9, above.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT maintain and enforce any clause in our collective-bargaining agreement with United Steelworkers of America, Local 5925, AFL–CIO–CLC, according the Union's recording secretary and treasurer superseniority with respect to layoff.

WE WILL NOT discriminate against any employees by laying them off instead of the Union's recording secretary and treasurer when the Union's recording secretary and treasurer do not in fact have top seniority in terms of length of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights protected by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to David Rice, Raymond Soward, Paul Sansom, Charles Deal, Nelson Edmonds, Otho Mullins, Jimmy Nance, Clarence Copley, Joney Watts, and other affected employees to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to them and others who were discriminatorily laid off instead of the Union's recording secretary and treasurer.

WE WILL expunge from our files any reference to the layoff of any employees affected by the superseniority as applied to the Union's recording secretary and treasurer for the March 1980 to April 1981 layoffs, and WE WILL notify them in writing that this has been done and that evidence of the unlawful layoff will not be used as a basis for future personnel actions against them.

WE WILL jointly and severally with the Union make those employees named above and any other unit employees whole for any loss of earnings they may have suffered as a result of the discrimination against them, with interest.

ENSIGN ELECTRIC, DIVISION OF HARVEY HUBBLE, INCORPORATED

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT maintain and enforce any clause in our collective-bargaining agreement with Ensign Electric, Division of Harvey Hubble, Incorporated, according the recording secretary and treasurer superseniority with respect to layoff.

WE WILL NOT cause or attempt to cause Ensign Electric, Division of Harvey Hubble, Incorporated, to discriminate against any employees by requiring that the collective-bargaining agreement be enforced so as to lay them off instead of the recording secretary and treasurer when the recording secretary and treasurer do not in fact have top seniority in terms of length of employment.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights protected by Section 7 of the Act.

WE WILL notify both Ensign Electric, Division of Harvey Hubble, Incorporated, and employees David Rice, Raymond Soward, Paul Sansom, Charles Deal, Nelson Edmonds, Otho Mullins, Jimmy Nance, Clarence Copley, Joney Watts, and other affected employees that we have no objection to reinstating the affected unit employees who but for the unlawful assignment of superseniority would not have been laid off.

WE WILL jointly and severally with Ensign Electric, Division of Harvey Hubble, Incorporated, make any unit employees whole for any loss of earnings they may have suffered as a result of the discrimination against them, with interest.

UNITED STEELWORKERS OF AMERICA, LOCAL 5925, AFL-CIO-CLC

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge: These cases were heard in Huntington, West Virginia, on July 14, 1981, pursuant to charges filed and served and a consolidated complaint which issued on June 10, 1981.

The complaint alleges that Ensign Electric, Division of Harvey Hubble, Incorporated, herein the Respondent Employer, and United Steelworkers of America, Local 5925, AFL-CIO-CLC, herein the Respondent Union, have engaged in unfair labor practices in violation of Sections 8(a)(1) and (3) and 8(b)(1)(A) of the Act. The Respondents filed answers denying the allegation of unlawful conduct set forth in the consolidated complaint.

Upon the entire record, the briefs submitted by all parties, and upon my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, the Respondent Employer, a West Virginia corporation, has been engaged in the manufacture of electrical distribution equipment and component parts for the mining industry at its Huntington, West Virginia, facility. During the past 12 months, a representative period, the Respondent Employer, in the course and conduct of its business operations, purchased and received at its Huntington, West Virginia, facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of West Virginia.

The Respondent Employer is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts and Background*

The essential facts are not in dispute. The Respondent Union represents employees employed by the Respondent Employer and has maintained a series of collective-bargaining agreements with the Respondent Employer over a period of many years. The most recent collective-bargaining agreement is effective from February 10, 1979, to October 1, 1981. Section 6-J of that agreement sets forth therein the following preferential seniority clause:

> The local union president, vice-president, recording secretary, treasurer and grievance committee shall have preferential seniority in the event of a layoff. Shop stewards shall have preferential seniority in their department and on their shift provided they can perform the work remaining.

A similar seniority preference clause, exclusive of seniority preference for stewards, had been maintained in 1970. The stewards' coverage was added thereafter.

In October 1978, there were, in total, about 340 employees at the Huntington plants. Between March 1979 and April 1981, extensive layoffs reduced the work force from 262 to 68 employees. These layoffs were effectuated pursuant to seniority and the seniority preference clause which was applied to prevent the layoff of stewards, grievance committeemen, and union officers.[1] Financial Secretary Valkie Fetty and Vice President Lyle James have "natural or earned" seniority which exceeds that of the employees laid off between March 1980 and April 1981, as well as the earlier 1979 layoffs. Union President James Godfry, Treasurer Doug Jarrell, and Recording Secretary George McCoy escaped the layoffs because of the contractual seniority preference, i.e., the so-called superseniority.

The complaint alleges that the Respondents have violated the Act by, in or about February 1980, maintaining and applying the seniority preference clause to the recording secretary, financial secretary, and treasurer, "notwithstanding they are not involved in the processing of grievances or the direct administration of the contract." It is agreed that those three officers are not directly involved in the processing of grievances. The president and vice president are directly involved in grievance processing, and there is no allegation that application of superseniority to them is unlawful.

B. *The Union*

Jurisdiction of Local 5925 extends exclusively to the Respondent Employer's Huntington plants, where all employees are members and subject to the dues-checkoff provision in the union contract. Union officers are elected by secret-ballot election. According to the International's constitution, article VII, section 9(b), eligibility for election to the position of officer is conditioned upon employment at a plant or mill within the jurisdiction of the local union. It would appear that employment elsewhere would serve to disqualify an incumbent officer for re-election. The Local is governed by the provisions of the International Union's constitution, and bylaws for local unions, the latter of which grants enabling power to the local to enact supplementary rules. Local 5925 adopted its own bylaws, which, inter alia, set forth that between local general marketing meetings, the highest local authority shall be the local executive board consisting of the president, vice president, recording secretary, financial secretary, and treasurer.

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[1] Only 5 of a total of 11 union officers are covered by the seniority preference clause. There were 10 shop stewards and 4 grievance committee members.

The function and duties of the executive board includes monthly meetings and meetings on call of the president; evaluation and decision of matters to be addressed to the local membership at regular membership meetings; investigation, evaluation, and recommendation to the membership at regular meetings as to whether members should attend conferences, seminars and schools, many of which concern union grievance processing and contract administration; and, as occurred on one occasion in 1979, the evaluation and recommendation to the membership of a change in the collective-bargaining agreement that had been proposed by the Respondent Employer. All members of the executive board have equal decisional authority which is manifested by a vote upon issues presented.

The financial affairs of the Local are managed by the financial secretary, treasurer and, to a lesser extent, the president, pursuant to authority derived from the International constitution and guidelines set forth by the International Union in a detailed manual. They are responsible for all disbursements and receipts and maintenance of records of such disbursements and receipts, including dues. The Local's financial management encompasses such activities as the operation of a voucher system reimbursement by check of members for the expenses and loss of wages incurred by participation in union affairs, a voucher system for the purchase of local union property and supplies, a system for the dispensing of strike benefits, and a system for the payment of arbitration processing expenses.

The activities of the financial officers are subjected to various review procedures of the International Union. Elected local trustees audit the Local's books every 3 months, and International auditors periodically conduct their own audits of the local records. As any member can file charges or complaints, the International Union may conduct an audit at any time. The treasurer and financial secretary must be available for those audits. They must also be available for any investigation or inquiry by governmental agencies and are responsible for reports to government agencies. They are obliged to make reports to the local membership body. Written reports are signed by them. Through a system of internal checks and balances imposed by the International, the disbursement procedures require the participation of each financial officer.

Members' dues are forwarded to the Local Union from the employer pursuant to the checkoff system. The financial secretary deals directly with the Employer's assistant personnel director at the plant on matters concerning membership dues.

In addition to a general account, the financial officers maintain as a separate account, a strike benefit account. Each financial officer participates in the disbursement of strike benefits. The most recent strike occurred in 1978-1979 prior to the most recent contract and lasted 4-1/2 months. Financial Secretary Fetty was chairman of the strike committee. He set up a special bank account and maintained records of all disbursements and receipts; at that time he was solely responsible. Strike benefit fund management is now shared by the financial secretary, treasurer, president, and a "staff man" who must execute all strike benefit checks. The fund is audited by the International Union.

All financial officers and the recording secretary are members of the executive board. The treasurer and financial secretary spend 50 hours and 20 hours a month in the execution of their duties and are each paid a stipend.

The recording secretary is responsible for the receipt at his home of all local union correspondence and maintenance of all such correspondence at the union hall, including arbitration summaries and newsletters, and the forwarding of all incoming correspondence to the proper destination, e.g., to the president, the grievance committee, etc. A file of arbitration summaries is maintained by him for use by stewards and grievance committeemen. He is unaided by any clerks or typists. He drafts all outgoing correspondence upon consultation with the president and executive board. The recording secretary maintains minutes of every monthly or special membership meeting. He maintains the monthly financial report. The International Union imposes on him certain duties regarding internal union elections. On occasions he has approached individual members on the jobsite, and elicited from them their interest in attending conferences and seminars, many of which pertain to grievance processing or contract administration. Like the financial secretary and treasurer, the recording secretary has occasionally been subjected to inquiries of members in the plant concerning their opinion of contract interpretation or grievances.

The recording secretary spends 15 to 20 hours a month on his duties as an officer and receives a stipend.

C. *Analysis*

By majority opinion, the Board held in *Dairylea Cooperative*, 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976), that seniority preference which effectuated the job retention of stewards during layoffs to the detriment of employees with greater "earned" or "natural" seniority was lawful because the representational function of the steward in the plant served the greater common good of all unit employees by furthering the effective administration of bargaining agreements on the plant level. However, the Board held that because of the "inherent tendency of super seniority clauses to discriminate against employees for union-related reasons," such clauses not limited to layoff and recall are presumptively unlawful and that the party asserting their legality must assume the burden of establishing justification.

In *Electrical Workers UE Local 623 (Limpco Mfg.)*, 230 NLRB 406 (1977), enfd. sub nom. *Anna M. D'Amico v. NLRB*, 582 F.2d 820, 824 (3d Cir. 1978), the Board was presented with the issue of whether seniority preference can validly be extended to union officers who may not possess "steward-type" functions. The Board majority rejected the view that superseniority in layoff situations is presumptively valid exclusively where the beneficiary is involved in grievance processing at the work place. The Board majority stated at 230 NLRB 406, 407–408:

> What is at stake is the effective and efficient representation of employees by their collective-bargain-

> ing representatives. Certainly, the representational activities carried out by union officials involved in the administration of the collective-bargaining agreement on behalf of employees extend beyond the narrow confines of grievance processing. These encompass at the very least a functioning local to assert the presence of the union on the job. The Act guarantees employees the right to be so represented through the collective-bargaining process. In fact, perhaps the most important union officer, the president, is usually not involved in grievance proceedings . . . we believe that, once it has been initially demonstrated that the official responsibilities of the union officer in question bear a direct relationship to their effective and efficient representation of unit employees, then their officer is entitled to the benefit of the same presumption afforded to union stewards.

The Board held that the union demonstrated that the union officer, the recording secretary, qualified for the seniority preference by virtue of her role in the overall administration of the collective-bargaining agreement, and further stated that the General Counsel "continues to have the burden of proving affirmatively that the application of a superseniority provision to a functional union officer in a layoff situation is invalid." The Board noted, inter alia, that the recording secretary was a member of the executive board, was responsible for maintaining records of membership and executive board meetings, presented shop reports for absent stewards, handled all local correspondence, posted notices of membership meetings, procured material needed by stewards, aided stewards in obtaining reimbursement for lost time on the job due to union duties, and participated informally in the grievance process by aiding stewards in the writing of grievances and advising stewards on contract questions, helped formulate bargaining positions, scheduled pickets during a recent strike and handled money for pickets. Finally, it is noted that if the recording secretary were laid off and thereafter was employed by an employer not a party to the collective-bargaining agreement, she would have been required to resign from office. The Board stated at 230 NLRB at 408:

> It is evident that the official responsibilities of the recording secretary bear a direct relationship to the effective and efficient representation of unit employees both at the plant level and for the entire amalgamated local. Equally clear is the fact that the recording secretary participates informally in the processing of grievances.

In *Otis Elevator Co.*, 231 NLRB 1128 (1977), the Board held that superseniority for union officers (president, vice president, and executive board members) who acted as de facto stewards was justified. However, the Board stated (231 NLRB at 1129) in reference to its *Limpco* decisions:

> Thus, in *Limpco*, we approved superseniority for the recording secretary—not because of her informal participation in grievances—but because we found that her official responsibilities bore a "direct relationship to the effective and efficient representation of unit employees . . . ." Similarly, the officers here were entitled to superseniority because in their official capacities they contributed to the ability of the Union to represent the unit efficiently and effectively.

The Board majority concluded that the General Counsel failed to prove the invalidity of the application of superseniority to the aforesaid union officers.

In *Expedient Services*, 231 NLRB 938 (1977), a Board majority approved the application of seniority preference to a recording secretary where union officers served as stewards and also participated in contract negotiations, subsequent supplements and amendments, and supplied guidance and instruction to stewards. The Board stated (231 NLRB at 940): "There is, then, no affirmative showing that the functions of officers, even without regard to their simultaneous duties as stewards, do not relate in general to furthering the bargaining relationship."

In *Allied Industrial Workers Local 1486 (Allen Testproducts)*, 236 NLRB 1368 (1978), the Board majority adopted the administrative law judge's decision which found justifiable the application of superseniority for layoff purposes to the financial secretary of the union where that officer as part of her duties, inter alia, issued reports and checks to the International union; released funds for lost time reimbursement of employee members, attended excutive board meetings where bargaining strategy, bargaining demands and grievance policies were discussed, but who had no direct responsibility in the processing of grievances; and who spent 2 or 3 hours a week on her union duties.

In the *American Can Co.*, 235 NLRB 704 (1978), the Board noted that superseniority was afforded to certain union officers, including, inter alia, a guard, the duties of whom were described in the Union's constitution as something in the nature of a sergeant-of-arms and a trustee of whom the constitution gave "charge of the union hall" and union property. Citing the *Limpco* and *Otis Elevator* cases, the Board majority found the contractual superseniority clause presumptively lawful and noted 235 NLRB at 704 and 705:

> A documentary description of officers' duties showing no visible or direct impact by them on contract administration is insufficient evidence to overcome the presumption and to establish a violation of the Act. The Board will not, on the basis of such evidence, second-guess a union's decision as to what officers aid the union in effectively representing the unit. Thus, the parties to a collective-bargaining agreement do not have to justify applications of superseniority to union officers, but, in order to establish a violation, the General Counsel must prove that a particular application is invalid.

The Board majority concluded that the General Counsel did not sustain the burden of proof and it therefore dismissed the complaint. Subsequently, the Board withdrew its order and reopened the proceeding to reconsider its decision because of the subsequent issuance by the Third Circuit of *Ana M. D'Amico v. NLRB*, supra.

The Court (582 F.2d 820 at 825) therein stated:

> It is evident . . . that the true rationale for validating a superseniority provision is found in the important function served by the recipient of superseniority in providing continuity of representation in carrying out the objectives of a collective bargaining agreement. Thus, those who, like union stewards, assist in resolving grievances on-the-spot are in a special way fulfilling an essential purpose of collective bargaining, i.e., adjusting grievances at their source.

However, with respect to the application of seniority preference for a recording secretary, the Court stated (582 F.2d at 835):

> Given the strong neutrality policy [Section 8 of the Act], we think that under *Great Dane Trailers* [388 U.S. 26 (1967)], the burden should be on the Union to justify the application of the provision to a recording secretary whose official duties in no way involved her in the collective bargaining process. . . . Furthermore we read the Board decision as requiring the Union to show that the Recording Secretary, as part of her official responsibilities and not merely as a volunteer, performed services which directly assisted in implementing the collective bargaining agreement. We take this to mean that the Union was obligated to produce credible proof that the individual in question was officially assigned duties which helped to implement the collective bargaining agreement in a meaningful way.

In reviewing the underlying facts, the Court stated that several of the duties of the recording secretary furthered the collective-bargaining interests of the bargaining unit, and noted, for example, the informal processing of grievances, the participation in formulating bargaining ideas, the scheduling of pickets during a recent strike and handling of money for pickets.

In reconsidering its decision in *American Can Co. (II)*, 244 NLRB 736, 737 (1979), the Board majority noted the divergence of opinion of Board Members with respect to the seniority preference issue. It characterized its Supplemental Decision and Order "based upon an aggregate majority" as follows:

> Chairman Fanning and Member Truesdale do not agree with the restrictions placed on superseniority by *Dairylea* and its progeny (see their dissent herein); Members Jenkins and Penello would not permit union officers to benefit from superseniority except when the officers also serve as stewards or otherwise engage in administration of the contract at the place and during the hours of their employment (see their concurrence herein); and Member Murphy adheres to *Dairylea* and *Limpco, supra*, but finds that the General Counsel has rebutted the presumption that the union officers here involved were lawfully afforded superseniority by showing that [the trustee and guard] are not engaged in contract administration (see her separate concurrence herein).[2]

In their brief in this case, counsels for the General Counsel state:

> At issue in this case is the application of the Board's decision in the *American Can Company*, . . . to a local union recording secretary, financial secretary and treasurer. In view of the unsettled state of the law regarding superseniority for union officers it is impossible at this time to point to any conclusive test by which a particular superseniority clause or its application may be judged. The widely divergent views of the Board members in *American Can* cast little light on the legality of the application of superseniority to the officers at issue in the instant case; however, counsels for the General Counsel believe that a close review of *American Can* and prior decisions, in view of their underlying rationale, supports the position that Respondent violated the Act by granting superseniority to those officers.

The General Counsel argues that the duties of the three officers in issue herein are not only unrelated to the grievance procedure but they are not directly related to the administration of the collective-bargaining agreement. The General Counsel characterizes the duties of these three officers as related wholly to the internal administration of the union which it divorces from the furtherance and maintenance of the collective-bargaining relationship. Furthermore, the General Counsel argues that in any event there is no necessity for the continued employment in order for those officers to fulfill their duties, i.e., they can as easily function from their houses if need be.

The Respondent Employer and the Respondent Union argue that *Dairylea, Limpco, Otis Elevator*, and other cases cited above have not been overruled by the Board, and that under the rationale of those cases the extension of superseniority to the three officers involved herein is fully justified in that those three officers do participate in the administration of the collective-bargaining agreement by virtue of the necessity of their functions to effectuate efficient representation of unit employees, to maintain viability of the collective-bargaining relationship, and to maintain a continuity of representation. They contend that the General Counsel takes an unjustifiably restrictive and unrealistic view of what constitutes "contract administration." As the Respondent Union argues in its brief:

> It should be obvious that a functioning local union is functionally integrated within the concept of effective bargaining. If dues are not collected, the union eventually dies; if membership records are not maintained, membership affairs cannot be conducted and if bills are not paid, arbitrators cease taking as-

[2] Member Murphy concluded in her concurrence that the duties of the trustee and guard were "too remote" and unrelated to the "general furthering of the bargaining relationship."

signments or worse, the local union membership who maintain grievance records are no longer available.

It is simply improper and impossible to segregate local union administration from collective bargaining functions.

I am in agreement with what appears to be the consensus of all parties herein that the Board has not overruled its prior decisions with regard to the basic rationale of justifiable seniority preference for union officers in layoff situations. The *American Can* case provided a forum for the reassertion of varying views of that rationale. However, I am constrained to apply what appears to be the unreversed Board precedent in the matter. The *American Can* case seems, at most, to have clouded the issue of which party has the burden of proof and which party must move forward with the evidence, in that it re-evaluated its prior decision in that case upon an evaluation of the Tenth Circuit Court's conclusion that the Union is "obligated to produce credible proof that the [union officer] was officially assigned duties which helped to implement the collective bargaining agreement." Of the majority, only then Member Murphy explicitly referred to the burden of proof in concluding that the General Counsel satisfied that burden by adducing documentary evidence consisting of the union constitution which failed to disclose relevant duties. She seemed to suggest that the General Counsel must move forward with evidence that the union officer performs nonrelevant duties, but that the union must affirmatively prove duties that justify seniority preference.

Unlike the *American Can* decision, the Respondent Union and the Respondent Employer have elicited testimony and adduced evidence of meaningful and relevant official duties of the union officers. I conclude that the evidence of their duties satisfies the various criteria set forth by the Board in its prior decisions which justify the application of seniority preference to the financial secretary, treasurer, and recording secretary in layoff situations.

I am in agreement with the Respondents that prior Board decisions do not impose such a restrictive definition of "contract administration" as is urged by the General Counsel. I agree that seniority preference must be premised upon its ultimate objective, the maintenance of the collective-bargaining relationship by the effective administration of the contract. The justification for the retention of stewards on the job at the plant during a layoff of other employees is the resulting continuity of representation and contract administration in the plant. With respect to union officers, the majority opinions of the Board hold that justification for their job retention is not to be judged by the criteria applied to stewards, i.e., the need for presence in the plant to process grievances. Rather, a broader view has been applied to union officers. The underlying concept to justify job retention of union officers is that argued by the Respondents, i.e., that it is unrealistic and impractical to divorce the Union's functional administration from contract administration where functional administration is necessary for the viability of effective and meaningful contract administration at the plant level. I agree with the Respondent's argument that layoff of the union officer, particularly in a situation of declining overall employment, is a threat to the continuity of effective representation and administration by experienced union officers. Turnover of functionally necessary union officers can only be disruptive to the bargaining relationship. A union officer who has found employment elsewhere is barred from seeking reelection. If he is employed elsewhere, his prime loyalty and interest will turn to his new employment and new coworkers even if he does not choose to resign. Moreover, it is unrealistic to expect that union officer having been laid off during a continuing downward employment spiral will continue to serve as effectively and attentively to their duties even if they have not as yet found other employment. Even though officers might be able to perform functionally necessary duties outside the work place, their presence and accessibility on the jobsite enhances the Union's presence. Their continued presence on the job insures a continued awareness by them of current conditions of employment of their members that enables them to intelligently cope with problems that arise and to which they must address themselves in their official capacity. Thus, for example, executive board members having firsthand, continuing experience of job, production, or personnel problems can intelligently evaluate employer proposals to amend, modify, or suspend application of terms of the collective-bargaining agreement, and can intelligently address the membership on such issues.

The evidence herein demonstrates that all three officers herein, as executive board members and in their individual capacities, perform administration functions that are directly related to the vital day-to-day functioning of the local union, e.g., the maintenance of an orderly financial system and the ability of the local union to effectively communicate with its members and with other entities. The maintenance of a strike fund, for example, is of utmost importance to the Union's effective role in the bargaining relationship as is the ability to draw upon the resource of a strike committee chairman. The education of its members in areas of grievance procedure and contract administration is manifestly directly related to the ability of the Union to effectively represent employees at the plant level. The union officers' role in ascertaining and effectuating that education and the selection of the appropriate recipient of such education by external as well as internal communication on the job is as vital to that object, if not more so, as is the receipt of such education by a particular member. The dissemination of resource materials to the stewards, and the maintenance of an orderly file of such material, manifestly aids the stewards in their grievance processing effectiveness. The ability to pay for arbitration costs is of paramount importance.

I conclude that the duties of the recording secretary, financial secretary, and treasurer, including their duties as members of the executive board, constitute vital, meaningful duties which are sufficiently related to the ultimate objective, the maintenance of an effective bargaining relationship by the implementation of the collective-bargaining agreement, to justify the application of a seniority preference to their positions in the context of facts in this case. Accordingly, I find that the complaint is without merit and ought to be dismissed.

D. *The 10(b) Issue*

The Respondent Union at the hearing, and the Respondent Employer in its brief, raises the affirmative defense that the underlying charge is untimely filed under Section 10(b) of the Act.[3]

The Respondent Union argues, inter alia, that since the first application of superseniority occurred in 1979 the charge is untimely. In view of my conclusion that the complaint lacks merit it is unnecessary to engage in a discussion of this issue, other than to conclude that Respondent's position, although in accord with the opinion of the Fifth Circuit Court of Appeals, is contrary to Board precedent. *Auto Warehousers*, 227 NLRB 628, 633-634 (1976), enf. denied 571 F.2d 860 (5th Cir. 1978).

[Recommended Order for dismissal omitted from publication.]

[3] Sec. 10(b) of the Act provides in relevant part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ."